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In the Supreme Court of the United States

October Term, 1982

MILLER BREWING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether union officials may be held to a higher duty than rank-and-file employees to uphold a collectively bargained no-strike agreement, including an obligation to take affirmative steps to deter or end any action in breach thereof, and whether an employer commits an unfair labor practice by selectively disciplining union officials for failing to satisfy that duty.

PARTIES TO THE PROCEEDING BELOW

The case below, in which Miller Brewing Company petitioned for review of an order of the National Labor Relations Board (Case No. 81-1413), was consolidated with Case No. 81-1054. In the latter case, Ervin Szewczuga and Gerald Treichel, charging parties before the National Labor Relations Board, sought to review the remedial aspects of the Board's order.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit (A1) is not officially reported. The Decision and Order of the National Labor Relations Board (A26) is reported at 254 N.L.R.B. 266.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 17, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act:

Section 8(a)(1), 29 U.S.C. §158(a)(1) (1976):

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Setcion 7; . . . ."

Section 8(a)(3), 29 U.S.C. §158(a)(3) (1976):

"(a) It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership of any labor organization. . . ."

STATEMENT OF THE CASE

On approximately October 24, 1977, a dispute arose at Miller Brewing Company's Milwaukee brewery concerning whether the Machinists' Union or the Electricians' Union had jurisdiction over the work involved in installing a piece of equipment known as a Filtec. Because the Machinists' Union lodged a complaint, work being performed on the Filtec by a subcontractor's electricians was temporarily suspended so that the complaint of the Machinists could be investigated. During the investigation, it was decided that the outside electricians would continue doing the work for an indefinite period of time. Rep-

resentatives of each Union were asked to supply information concerning the possible jurisdiction over the Filtec work. After evaluating this information, the Company determined to assign the work to the Machinists. This decision was placed in written form and distributed to representatives of both Unions at a meeting on November 1, 1977. (A47-49).

Ervin Szewczuga and Gerald Treichel attended this meeting on behalf of the Electricians and expressed their extreme dissatisfaction with the decision. During the meeting, Szewczuga stated that it seemed that an individual had to be a "rabble-rouser" in order to get anything and Joe Paulicivic, the Labor Relations Manager, warned those in attendance against resorting to self-help rather than using the grievance procedure. (A49).

Szewczuga and Treichel returned to their work areas and reported the Company's decision to their constituents. Upon learning of the decision, they became extremely angry and various individuals raised the possibility of a walkout. (A51, 57). After this initial meeting, Szewczuga and Treichel discussed the matter with Ted Collins, another Union Steward for the Electricians, to determine if any discussions in recent contract negotiations might pertain to this work assignment. It was suggested at this meeting that they wait until the Machinists did some of the work and file a grievance. This suggestion was then related to the rank and file. (A52).

The suggestion to file a grievance was rejected quickly, and with relatively little discussion the employees decided to walk off the job and go to the union hall. Stewards Szewczuga and Treichel then clocked out, changed clothes, and prepared to go to the union hall. Notably, Steward Treichel was the first individual to clock out. (A55).

During this time, Steward Collins also discovered that his people intended to leave the brewery. Upon learning of this, he immediately advised his supervisor that there was a problem and that he was going to try to keep his people there. Shortly thereafter, Paulicivic and Dan Feinsinger, Industrial Relations Manager, arrived to assist Collins in talking to his people. Henry Carrera, the Local Business Representative, also arrived and all four of them convinced these employees not to leave the brewery. (A 61-62).

The Company was not as successful with the two groups headed by Szewczuga and Treichel. Although approached by representatives of management who advised them that it was illegal to walk out and that they would be subject to discharge if they did so, Szewczuga and Treichel continued in their walkout. Although neither Szewczuga nor Treichel ordered any employee to disobey the management representatives' orders to return to work, they also did not urge the employees to return to work or make any other effort to dissuade the employees from leaving. (A56, 60).

After leaving the Brewery, the two groups of employees went to the Union Hall. There, they met with Business Representative Carrera, who advised them that the proper course of action would be to file a grievance and resolve the matter under the auspices of the National Labor Relations Board.[1] The next day, the Electricians who had walked off the job reported to work at their normal time. (A66).

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1. The matter was referred to the Board and the assignment of the work to the Machinists was upheld. *Local 494, International Brotherhood of Electrical Workers*, 235 N.L.R.B. 1550 (1978).

Following the return of the Electricians, the Company immediately initiated an investigation into the strike. All employees who participated in the activities of that day, as well as all supervisors, were questioned. Based on the facts that were compiled during the investigation, it was concluded that there were three groups of people involved. First, those who had stopped work but remained on the premises; secondly, those who had stopped work and left the premises; and finally, those who had led the walkout. Based on these levels of involvement, three different levels of discipline were recommended. Written warnings were given to those individuals who participated but did not leave the premises. A three-day suspension without pay was given to those who had left, and termination was given to those who had led the walkout. With respect to the third level, management determined that Szewczuga and Treichel had acted as the effective leaders of the walkout and had not taken appropriate action to deter the strike. (A67).

Grievances filed by Treichel and Szewczuga were processed to arbitration with the arbitrator determining the discharges were not contrary to the provisions of the collective bargaining agreement. (A71). An unfair labor practice charge was filed with the National Labor Relations Board alleging violations of Sections 8(a)(1) and (3) of the Labor Management Relations Act, 29 U.S.C. §§158 (a)(1) and (3) (1976). A complaint was issued by the Board on August 11, 1978, and a hearing was held before an Administrative Law Judge on January 15-17, 1979. On April 2, 1980, the Administrative Law Judge issued his decision, finding that Miller Brewing Company had violated the provisions of Sections 8(a)(1) and (3) of the Act. (A39). On January 14, 1981, the Board affirmed the decision of the Administrative Law Judge. (A26). Fol-

lowing Petitions for Review filed by both the charging parties and the employer, the Court of Appeals for the District of Columbia Circuit enforced the Board's order in all respects on August 17, 1982. (A1).

REASONS FOR ALLOWING THE WRIT

An Important Question of Labor Law Exists That This Court Should Settle Concerning the Duty of Union Officials to Honor and Enforce a No-Strike Pledge.[2]

During the initial years of labor relations under the Labor Management Relations Act, the principle became well established in the field that a union official had a greater duty to abide by the terms of a no-strike commitment in a collective bargaining agreement and that an employer could impose more severe discipline on such an official than that imposed on a rank-and-file employee for violating the commitment. This principle had developed in the decisions of labor arbitrators. In 1946, however, a strike occurred at the Stockham Pipe Fittings Company. Although not remarkable in itself, the strike was the subject of both an arbitration and an unfair labor practice proceeding before the National Labor Relations Board.

In *Stockham Pipe Fittings Company*, 4 Lab. Arb. 744 (1946), Arbitrator Whitley P. McCoy, recognizing established arbitral authority, held that an employer could discipline union officials more severely than the rank-and-file employees for their participation in an unauthorized strike:

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2. This Court has granted certiorari in *Metropolitan Edison Company v. NLRB*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982). The question presented in this case was also presented in that case.

> Joining other employees in a strike that violates a contract . . . may be expected of the ordinary member of a union and is not ground for singling him out for penalty. Likewise as to failure to take steps to end an unauthorized strike. But a different principle is applicable to officers and committeemen of the union. Union office carries with it responsibilities and obligations both to the company and to the union.

Id. at 745-46.

In resolving the unfair labor practice charge that arose out of this strike, the Board rejected the General Counsel's assertion that the employer violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§158(a)(1) and (3) (1976), by disciplining a union official more severely than other participants in the strike:

> [W]e are convinced on this record that Falkner, as the admitted leader of the Local, and as one of the negotiators and signatories to a valid no-strike agreement between the Union and Respondent, had an even greater duty than the rank-and-file employees to uphold its provisions.

Stockham Pipe Fittings Company, 84 N.L.R.B. 629 (1949). Thus, in its first reported opportunity to address the question, it accepted the well-established principle that had been developed by labor arbitrators.

For the next 28 years, the Board and arbitrators were uniform in their approach to this problem. *See, e.g., Super Valu Xenia*, 228 N.L.R.B. 1254 (1977); *Russell Packing Company*, 133 N.L.R.B. 194 (1961); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960); *ITT Thompson Industries, Inc.*, 70 Lab. Arb. 970 (1978) (Seifer, Arb.); *Parker Company*, 60 Lab. Arb. 473 (1973) (Edwards, Arb.);

Elgin Sweeper Company, 50 Lab. Arb. 1029 (1968) (Graff, Arb.)

It is evident throughout this long period of time that the Board and labor arbitrators were simply recognizing reality: Union officers necessarily are leaders of any work stoppage in which they participate. It is preposterous to suggest that a union official can step out of this leadership position when he joins a work stoppage. As stated by one arbitrator:

> When Union Stewards and other Union officers participate in an illegal walkout, by the mere fact of that participation as Union officials, they provide leadership support for the strike, leadership which inescapably goes beyond the mere following of other workmen who have no recognized and official leadership positions in the Union.

Litton Systems, Inc., 71-1 Lab. Arb. Awards ¶ 8215 at 3710-11 (1971) (Abernathy, Arb.).

This understanding was not limited to labor arbitrators. In *Chrsyler Corp.*, 232 N.L.R.B. 466 (1977), the Board upheld a decision approving the discharge of a union shop steward for his role in an unauthorized work stoppage and adopted the following language:

> Smith was elected to his position as shop steward by the second-shift employees in his department on two occasions. *He did not cease to be a leader of these people in matters involving labor relations merely by leaving the plant gates . . . Accordingly, in light of considerations relating to his status alone*, in addition to his actions on the afternoon and evening in question, *I conclude that Smith not only was engaged in an illegal walkout but that his presence provided this action with his active approval and encouragement*, not

> merely negative leadership, and that respondent had ample basis for concluding that Smith exercised a leadership role in the walkout when it determined to discharge him. . . .

Id. at 475 (emphasis added)

In light of the influential position of union stewards in the work place, it is no wonder that the principle that union stewards can be held to a higher standard of conduct concerning compliance with a no-strike obligation became firmly established. This principle was well stated in *United Parcel Service*, 47 Lab. Arb. 1100 (1966) (Schmertz, Arb.):

> If there is one principle that is universally recognized in the field of industrial relations, it is that shop stewards have the highest duty to faithfully adhere to all of the provisions of the Collective Bargaining Agreement and to actively instruct each employee to do so as well. While it is improper for an ordinary employee to deliberately breach the Agreement, a similar act by a shop steward is untenable and grounds for his discharge. It is the obligation of the steward to set an example for all union members within his jurisdiction by demonstrating his loyalty to the terms and conditions of the contract negotiated by his Union with the Employer. . . . Indeed, a shop steward's duty in the face of an unauthorized strike is well settled. Not only should he make a determined effort to prevent the stoppage before it begins, but upon its development must actively and unequivocally attempt to bring an end to the stoppage at the earliest possible moment.

Id. at 1100-01. As a result of this higher standard, a more severe penalty for its violation is appropriate.

> It follows inescapably that when a Union steward or committeeman participates in a work stoppage . . . he

> is setting an example for the other employees in indicating by his action that the stoppage has his tacit approval and sanction. This is a graver offense than participation by an ordinary employee and justifies a more serious penalty.

International Harvester Company, 14 Lab. Arb. 986, 988 (1950) (Seward, Arb.).

In *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581-82 (1960), this Court found that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." Thus, when the Board addressed this issue in *Precision Castings Company*, 233 N.L.R.B. 183 (1977), there was no question that the ability of employers to discipline union officials more severely than rank-and-file employees for participating in an unlawful work stoppage was firmly established in the law.[3]

In *Precision Castings*, the Board, without explanation, rejected these years of Board and arbitral authority and held that it was an unfair labor practice to discipline a union official more severely than rank-and-file employees for participating in an unauthorized work stoppage in violation of a collective bargaining agreement. According to the Board, this was discrimination directed against an employee on the basis of holding union office.

In subsequent decisions, the Board made it clear that this was was a *per se* rule and absent clear and convincing evidence that the union official actively instigated the strike, the discipline could not be any different than that

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3. It is noteworthy that the strike at the Milwaukee brewery occurred on November 1, 1977. The decision in *Precision Castings Company* was issued on November 3, 1977.

imposed on other participants. *See, e.g., Bethlehem Steel Corp.*, 252 N.L.R.B. 982 (1980), *enf. denied sub nom., Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982); *Metropolitan Edison Company*, 252 N.L.R.B. 1030 (1980), *enforced*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982); *Armour-Dial, Inc.*, 245 N.L.R.B. 959 (1979), *enf. denied*, 638 F.2d 51 (8th Cir. 1981); *Gould Corporation*, 237 N.L.R.B. 881 (1978), *enf. denied*, 612 F.2d 728 (3rd Cir. 1979), *cert. denied sub nom., Moran v. Gould Corp.*, 449 U.S. 890 (1980); *Indiana and Michigan Electric Company*, 237 N.L.R.B. 226 (1978), *enf. denied*, 599 F.2d 227 (7th Cir. 1979).

The theory behind the Board's *per se* approach to this problem was that the more severe discipline of the union officials would deter them and others from holding union office. This theory was rejected quickly by the first court of appeals to address the question. In *Indiana and Michigan Electric Company v. NLRB*, 599 F.2d 227 (7th Cir. 1979), the court said:

> Employer action that would impair some right or restrict some legitimate activity of union officials and thereby discourage members from holding union office would no doubt have an inherently adverse effect on employee rights. The same is not true, however, of employer action that at most deters union officials from deliberately engaging in clearly unlawful conduct that is both a violation of their duties as employees and union members and a repudiation of their responsibilities as union officials.

Id. at 228. *Accord NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981).

Shortly thereafter, the Court of Appeals for the Third Circuit also rejected this theory in denying enforcement to a Board order:

> As for the contention that as a result of this ruling prospective stewards will be dissuaded from seeking union office, the obvious and short answer is that they should be deterred from seeking office if they intend thereafter to participate in illegal work stoppages or to repudiate contractual obligations which were freely negotiated and voluntarily assumed. The company's action and our ruling deters no other kind of 'union' activity.

Gould, Inc. v. NLRB, 612 F.2d 728, 733-34 (3rd Cir. 1979), *cert. denied sub nom., Moran v. Gould Corp.*, 449 U.S. 890 (1980).

Although the courts have remained firm in their rejection of the Board's theory that such discipline will deter people from accepting leadership positions with a union, the D. C. Circuit and the Third Circuit have adopted approaches that are not consistent with the generally accepted industrial practice discussed above. In a split decision, the Third Circuit required that any obligation of a union official to take action to deter or end an unauthorized strike must be specifically stated in the collective bargaining agreement. *Hammermill Paper Company v. NLRB*, 658 F.2d 155 (3rd Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3622 (U.S. Feb. 9, 1982) (No. 81-1438). Thus, although it rejected the Board's *per se* rule, it affirmed the finding of an unfair labor practice because of the lack of express contract language.

The Third Circuit continued its retreat from generally accepted industrial practice in *Metropolitan Edison Company v. NLRB*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, No. 81-1664 (June 14, 1982). In that case, the court adhered to its previous decision that the antistrike obligations must appear on the face of the collective bargaining agreement. In so doing, the court rejected the employer's

contention that a series of arbitration decisions interpreting the contract as requiring such affirmative antistrike conduct was just as good as specific contract language.[4]

In *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), the court disagreed with the Third Circuit's approach in *Metropolitan Edison*.

In denying enforcement of a Board order, the court held:

> [W]here the collective bargaining process has imposed higher duties upon union officials than the rank-and-file, the officials may be more harshly punished than the rank-and-file for their conduct in violation of the no-strike clause and an employer's selective discipline of the offending union official will not constitute an unfair labor practice.

Id. at 341.

The D. C. Circuit determined that the "collective bargaining process" included previous arbitration decisions interpreting the collective bargaining agreement. Thus, because of a series of arbitration decisions interpreting the no-strike language as imposing greater obligations to abide by its terms on union officials, the court found no violation in the employer's decision to discipline an offending union committeeman more severely than the rank-and-file.

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4. In *C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981), the court found that the steward had complied with the higher duty imposed on him by a general no-strike clause and enforced the Board's order. The court determined that the only thing the steward did not do was cross the picket line and in the absence of a contract provision requiring him to do so, the court declined to say that this was necessary to meet his greater duty.

In the instant case, however, the D. C. Circuit court refused to find that the "collective bargaining process" included anything other than the words of the collective bargaining agreement and the interpretation of those words by an arbitrator. Thus, it held that Miller Brewing Company had committed an unfair labor practice when it imposed more severe discipline on the two stewards who participated in the unauthorized work stoppage than on rank-and-file employees who had participated. In reaching this decision, the court noted that the collective bargaining agreement did not contain specific language imposing greater obligations on union officials in the event of an unauthorized strike. Moreover, the court found that the simple fact that an arbitrator had found that the discipline was not contrary to the collective bargaining agreement was insufficient to establish that the contract imposed greater duties on the stewards.

The court ignored the substantial case law that had developed from arbitrators and the earlier decisions of the Board. As this Court stated in *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581-82 (1960), "the industrial common law—*the practices of the industry* and the shop—is equally a part of the collective bargaining agreement although not expressed in it." (Emphasis added). The decision of the D. C. Circuit in the instant case clearly rejects this and renders meaingless the years of industry practice that had become a part of labor relations in this country.

If the principle advocated by the Court of Appeals for the District of Columbia is allowed to stand, there will be no validity to a no-strike clause. According to the court, if there is no specific language in the contract or arbitration decisions under the contract that requires union officials to take action to deter or end an unau-

thorized strike, then they have no obligation to do so. The court forgets the vast amount of arbitral and Board precedent that existed when the contract language was adopted by the parties.

If an employer cannot count on the union leadership to take action to deter or end an unauthorized strike, there is no value to the employer in having a no-strike clause and granting the union leadership benefits that enhance the power of their position. Why should credence be given to the words and promises of a union official if the employer cannot count on that official to act to uphold the contract?

An employer's ability to impose discipline on union officials is, for all practical purposes, the only effective means the employer has to compel action on the part of these officials to seek to deter or end unauthorized strikes. An employer cannot recover damages from the individual strikers. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981).[5] Moreover, unless the employer can fit within the narrow exemption granted by *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and *Buffalo Forge Company v. United Steelworkers*, 428 U.S. 397 (1976), injunctive relief is barred by Section 4 of the Norris-LaGuardia Act, 29 U.S.C. §104 (1976). Even if injunctive relief is available, the length of time necessary to obtain an injunction significantly diminishes the deterrent effect of this remedy.

It is evident that the state of the law in this area is confused. Four circuits have addressed the question with varying results. As is evident in the Board's decision in

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5. In a true wildcat strike, damages cannot be obtained from the union. *Carbon Fuel Company v. United Mine Workers*, 444 U.S. 212 (1979).

the instant case and others raising this issue, not even the Board can reach a consensus on the issue.[6] Thus, it is imperative that employers be given clear, logical guidelines concerning the obligations of union officials and the rights of employers to take disciplinary action. This is an extremely significant question in the field of labor relations and the confusion that currently exists should be resolved by the Supreme Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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6. In its most recent decision on the subject, *Consolidation Coal Company*, 263 N.L.R.B. No. 188 (1982), two members of the Board voted to retain the *per se* rule and two members voted to reject this position and return to the well-established principle advocated by Petitioner.